

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON

JAMES DERRICK O'NEAL,

Petitioner,

vs.

MARGARET BAGLEY, Warden

Respondent.

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Case No. 1:02-cv-357

District Judge Michael H. Watson  
Magistrate Judge Michael R. Merz

Death Penalty Case

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JOINT STATUS REPORT

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In accordance with the Court's order of October 14, 2004 the undersigned counsel submit this joint status report on behalf of Petitioner and Respondent.

This case is a petition for a writ of habeas corpus filed by a state prisoner under 28 U.S.C. Section 2254 challenging his conviction and sentence of death on federal constitutional grounds. The petition was filed on May 21, 2002. Record Entry 7. The case was referred by Judge Sandra S. Beckwith to Magistrate Judge Michael R. Merz on May 31, 2002. Record Entry 9.

Judge Merz issued a scheduling order on June 7, 2002. Record Entry 11. Pursuant to that scheduling order Respondent filed a return of writ, transcripts, and an appendix containing pertinent portions of the state court record on September 9, 2002. Record Entries 13-20.

The June 7, 2002 scheduling order contemplated that Petitioner would file his traverse to the return of writ by November 12, 2002. However, as a result of the decision in Atkins v. Virginia, \_\_ U.S. \_\_, 122 S.Ct. 2242, 153 L.Ed.2d 335 (June 20, 2002), on November 12, 2002 Petitioner filed with this Court a motion for leave to amend his petition for a writ of habeas corpus to include an eighteenth ground for relief claiming that his execution would violate the Eighth Amendment to the United States Constitution because he is mentally retarded. Record Entry 21. By notation order of November 13, 2002 Judge Merz granted the motion to amend.

Petitioner also filed a motion on November 12, 2002 to hold the case in abeyance pending exhaustion of state court remedies with respect to his Atkins claim. Record Entry 22. By order of December 11, 2002 Judge Merz granted Petitioner's motion. Record Entry 24.

On November 15, 2002 Petitioner filed a petition for postconviction relief under Ohio Revised Code Section 2953.21 et seq. raising his Atkins claim in the Court of Common Pleas of Hamilton County. On June 3, 2003 the Hamilton County Prosecuting Attorney, on behalf of the State of Ohio, filed a memorandum in opposition to the petition for postconviction relief.

On April 7, 2004 Judge Mark Schweikart of the Hamilton County Court of Common Pleas filed findings of fact and conclusions of law and an entry dismissing the petition without an evidentiary hearing, and an entry denying Petitioner's motion for the appointment of a mental retardation expert and for discovery.

Petitioner filed a timely notice of appeal to the Court of Appeals for Hamilton County, First Appellate District. As a result of the decision of the Court of Appeals in State of Ohio v.

Cedric Carter, Case No. C-030657 (June 29, 2004 unreported), the parties agreed to the dismissal of the appeal and the remanding of the case to the trial court for an evidentiary hearing. The entry dismissing the appeal without prejudice was filed in the Court of Appeals on August 13, 2004.

On October 14, 2004 a scheduling hearing was held before Judge Schwiekart. Judge Schwiekart appointed mental retardation experts for Petitioner and the State of Ohio. Both experts are to examine Petitioner and submit reports with their findings and conclusions by January 19, 2005, on which date a further scheduling hearing will be held.

Respectfully submitted,

s/John J. Gideon  
JOHN J. GIDEON (0008151)  
(Trial Counsel)  
250 East Stanton Avenue  
Columbus, Ohio 43214-1268  
Phone: (614) 430-3377  
Facsimile: (614) 430-3378  
Email: gideonjj@cs.com

and

s/Michael W. Krumholtz  
MICHAEL W. KRUMHOLTZ (0009099)  
(Co-Counsel)  
Bieser, Greer & Landis LLP  
6 North Main Street, Suite 400  
Dayton, Ohio 45402-1908  
Phone: (937) 223-3277  
Facsimile: (937) 223-6339  
Email: mwk@bgllaw.com

COUNSEL FOR PETITIONER

JIM PETRO  
OHIO ATTORNEY GENERAL

s/Stephen E. Maher  
STEPHEN E. MAHER (0032279)  
(Trial Counsel)  
Assistant Attorney General  
Capital Crimes Section  
30 East Broad Street, 23rd Floor  
Columbus, Ohio 43215-3428  
Phone: (614) 728-7055  
Facsimile: (614) 728-8600  
Email: smaher@ag.state.oh.us

COUNSEL FOR RESPONDENT